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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of FLOYD A. and MARIA T. KATSKE.	B161298 (Los Angeles County Super. Ct. No. BD244509)
FLOYD A. KATSKE, Respondent, v. MARIA T. KATSKE, Appellant.	

APPEAL from an order of the Superior Court for the County of Los Angeles, Richard E. Denner, Judge. Affirmed.

Law Offices of Paul F. Moore II and Paul F. Moore II for Appellant.

Freid and Goldsman and Gary J. Cohen for Respondent.

The trial court found that Maria T. Katske had dissipated nearly $150,000 of her children's funds and ordered her former husband Floyd A. Kaske to recoup those funds by withholding one-half of his monthly spousal support payments and depositing the sums withheld into blocked accounts for the benefit of the children. Maria[1] appeals, contending she properly used money from her children's accounts for educational purposes and the trial court thus abused its discretion in ordering her spousal support payments impounded. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Maria and Floyd were married in July 1983 and separated in September 1996. They have two children (twins), born in April 1989. Both Maria and Floyd are physicians. Maria apparently stopped practicing when she became pregnant. After the children were born, she worked as a full-time mother and homemaker for her family and also managed various investments she jointly owned with Floyd.

The April 1997 Stipulations and Agreement

A stipulation and order for temporary child and spousal support, entered by the court on April 21, 1997, provided that Maria would receive one-half the monthly disability payments being made to Floyd (her share was approximately $9,800) and, as spousal support, an additional $4,500 per month. A further stipulation reached by the parties in late April 1997 provided Maria "shall have management and control of the children's financial accounts with the following conditions: [¶] . . . [¶] 2. [Maria] hereby acknowledges her fiduciary responsibility to the children in the management of the children's financial affairs, and agrees to act in the best interests of the children's finances." According to a letter from Maria's counsel dated March 29, 1999, as of December 31, 1998 Maria managed 10 accounts for the children with total balances in excess of $106,000.

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[1] As is customary in family law proceedings we refer to the parties by their first names, not out of disrespect, but for purposes of clarity and convenience. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

At a voluntary settlement conference in June 1997 supervised by retired superior court commissioner Jill Robbins, Maria and Floyd reached agreement on a number of issues relating to the division of marital property. A family-owned entity known as the Velarte partnership, with an estimated net value of $106,874, was awarded to Maria. The parties agreed that Velarte would pay their two children the sum of $18,243, representing their interest in the partnership. Another family entity, Twin Oaks, Inc., with a net value of $56,502, was also awarded to Maria. The parties agreed that Twin Oaks would pay the children $20,000 for their interest in the corporation.

The 1998 Tentative Decision

The issue of marital status was bifurcated from all other issues, and a judgment of dissolution of marriage as to status only was entered by the court on December 16, 1997, with jurisdiction reserved over all other issues.

Trial of the reserved issues occurred on 23 separate dates over a five-month period in 1998 before retired superior court commissioner Keith M. Clemens sitting as a temporary judge pursuant to a stipulation and order. A notice of tentative decision was filed on November 5, 1998 (1998 Tentative Decision). In its 1998 Tentative Decision the court ordered spousal support in the sum of $6,500 per month and guideline child support at $4,148 per month, payable by Floyd to Maria. The 1998 Tentative Decision also incorporated the terms of the parties' June 12, 1997 partial settlement agreement, including the provisions awarding the Velarte partnership and Twin Oaks, Inc. to Maria, and ordered Maria to cause Velarte to pay the children $18,243 and to cause Twin Oaks, Inc. to pay the children $20,000.

In the 1998 Tenative Decision, the court expressly declined to order either Maria or Floyd to pay additional sums for private school tuition or other costs of education for the children. "[E]ven though it may be very desirable and very beneficial for a child who does not have special needs to attend private school, the court does not have authority under the Family Code to order a parent to contribute to the costs of such education. Just as in an intact family, separated or divorced parents need to negotiate for financial

contributions from one or both parents for the costs of private education where the children do not have special needs. A parent cannot look to the court to impose such an obligation on the other parent." In addition, the court rejected Maria's tuition reimbursement claim, which was based on her assertion Floyd had agreed to pay "either one-half or all of the private school tuition for the parties' minor children, effective 1997," noting that "[t]here was no written agreement between the parties on this subject, or correspondence making reference to such an agreement, which the court might expect given the high level of conflict between the parties on financial matters as well as other matters."

The 1999 Further Decision and Further Judgment on Reserved Issues

Following further proceedings before Commissioner Clemens, which took place in March and April 1999, the court on June 7, 1999 filed its notice of tentative decision on remaining issues in the trial on reserved issues other than attorney fees (1999 Further Decision). "[F]ind[ing] that the level of trust between the parties is so low, the financial affairs even of funds belonging to the children are sufficiently complex, and [Maria] did not provide [Floyd] with accountings of her management of the children's accounts after the parties stipulated that [Maria] would manage those accounts," the court determined that Maria and Floyd must jointly manage the children's accounts. In particular, the 1999 Further Decision specifies that "[t]he children's accounts shall be made into accounts that require the signature of both parties to withdraw any funds."

A Further Judgment of Dissolution of Marriage on Reserved Issues was filed on December 8, 1999 (1999 Judgment). Floyd was ordered to pay to Maria monthly child support[2] of $4,148, to continue until the children reach age 18, and monthly spousal support of $6,500, until the death of either party, remarriage of Maria or December 31, 2004, whichever first occurs. As part of the division of community property, the 1999

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[2] The parties ultimately reached agreement on a parenting schedule. Floyd had custody of the children 43 percent of the time; Maria had custody 57 percent of the time.

Judgment awarded to Maria the entire community property interest in Velarte Partnership and in the stock of Twin Oaks, Inc. and ordered Maria to cause Velarte to pay the parties' children $18,243 and to cause Twin Oaks, Inc. to pay the children $20,000 for their interests in the partnership and the corporation. The 1999 Judgment also repeated verbatim the portion of the 1998 Tentative Decision rejecting Maria's claim for reimbursement for private school tuition for the parties' children, concluding that Maria had failed to meet her burden of proof on the claim.

Adopting the findings from the 1999 Further Decision regarding the need for joint management and control of the children's financial accounts, the court's 1999 Judgment "orders that the parties shall jointly manage the children's accounts. The children's accounts shall be made into accounts that require the signature of both parties to withdraw any funds. The parties together may make decisions on the management of the funds in those accounts."

The Order to Show Cause Hearing

In early May 2002, appearing in propria persona, Maria filed an application for an order to show cause for enforcement of judgment, raising four issues of Floyd's alleged noncompliance with provisions of the 1999 Judgment. In response, on May 22, 2002 Floyd filed his own application for an order to show cause for enforcement of the 1999 Judgment and for an offset of spousal support, asserting a number of complaints about Maria's alleged noncompliance with provisions of the 1999 Judgment, including several issues relating to the children's accounts. Specifically, Floyd alleged that Maria had failed to cause the children to be paid for their interests in the Velarte partnership and Twin Oaks, Inc. (a total of $38,243), as she had been ordered, and that Maria had also failed to transfer the children's funds held by her (allegedly totaling $109,963) into accounts under joint management of the parties, as the court had ordered. In fact, Floyd stated Maria had conceded in other proceedings that the children's accounts over which she had control now had zero balances, allegedly because Maria had spent the money

previously in those accounts on the children's private school tuition. Floyd requested an order offsetting a portion of Maria's spousal support to replenish the children's accounts.

In her response to the order to show cause Maria filed a declaration in which she asserted the $38,243 due the children from Velarte and Twin Oaks had, in fact, been distributed for their benefit in 1998 and had been used by her to pay for private school tuition. Acknowledging that the balances in the children's accounts for which she had sole responsibility were zero, Maria argued she had properly used those funds to reimburse herself for sums "advanced" for tuition and other educational expenses prior to the December 8, 1999 entry of the 1999 Judgment, pursuant to the management authority given her by the parties' April 1997 stipulation.

A hearing on the order to show cause was held on July 1, 2002. On August 2, 2002 the court entered its order finding Maria had (a) failed to comply with the provisions in the 1999 Judgment directing her to cause Velarte and Twin Oaks to pay the children sums representing their interests in the two entities and ordering her to jointly manage the children's accounts with Floyd and (b) "dissipated the children's funds in the amount of $148,206.90." Based on those findings the court instructed Floyd to recoup the children's funds by withholding one-half of his monthly spousal support payments and depositing the sums withheld into blocked accounts for the benefit of the children. In addition, the court ordered that neither party may withdraw any funds from the newly established accounts without prior court order.

Maria filed a timely notice of appeal.

DISCUSSION

In directing Floyd to replenish the children's accounts by withholding a portion of the spousal support payments he makes to Maria, the trial court necessarily found that Maria had improperly utilized the funds she was responsible for managing. On appeal, as she did in the trial court, Maria readily acknowledges she spent the children's funds, arguing that prior to entry of the 1999 Judgment, which required joint management of the children's accounts, she properly exercised her discretion to use those funds to pay for

private school tuition, field trips and other educational purposes. This is, of course, an attack on the sufficiency of the evidence.

Under the substantial evidence rule of appellate review, "the reviewing court's task begins and ends with a determination as to whether there is any substantial evidence in the record to support" the trial court's finding of "dissipation" or improper use of funds. (*In re Marriage of Leff* (1972) 25 Cal.App.3d 630, 641.) We evaluate the evidence in the light most favorable to the respondent on appeal, giving it all reasonable inferences and resolving conflicts in the evidence in the respondent's favor. (*Booth v. Robinson* (1983) 147 Cal.App.3d 371, 377.) We do not reweigh the evidence (*Robinson v. Pediatric Affiliates Medical Group, Inc*. (1979) 98 Cal.App.3d 907, 910); nor do we judge credibility (*People v. French* (1978) 77 Cal.App.3d 511, 523). This rule is no different when a trial court resolves questions of fact on the basis of declarations presented to it. "'[T]hose affidavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed.' [Citations.]" (*Lynch v. Spilman* (1967) 67 Cal.2d 251, 259.)

Substantial evidence supports the trial court's determination that Maria used the children's funds for improper or unauthorized purposes. First, other than her own assertion that she used their money to pay for costs relating to the children's education, testimony the trial court was entitled to disbelieve, Maria presented no evidence the children's funds had actually been used for that purpose.[3] Moreover, in proceedings before Commissioner Clemens during the first half of 1998, Maria unsuccessfully argued that she (not the children) was entitled to reimbursement for private school tuition based

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[3] Whether or not Maria was authorized to use the children's funds for pre-college education expenses pursuant to the April 1997 stipulation, a question the parties vigorously dispute, there is no doubt that the stipulation imposed on Maria an ongoing obligation to provide Floyd with copies of the financial records relating to those accounts under her control.

on Floyd's purported agreement to pay those costs,[4] belying her current claim that she had simply "advanced" or loaned the children the sums she had paid to date for that purpose. Finally, Maria offered no explanation as to why, if it were true that she had exhausted the children's accounts for educational purposes, she failed to advise the court at the time of the 1999 Judgment that no funds remained under her control and thus there was nothing to transfer to jointly managed accounts.

Maria's belated assertion of the doctrine of laches as a bar to the trial court's order requiring replenishment of the children's accounts, even if it were properly before us,[5] lacks merit. Maria's argument, in essence, is that Floyd knew she was using funds from the children's accounts for their private school tuition and unfairly allowed her to continue to do so for a number of years. However, as discussed above, the trial court's order necessarily rests on the determination that Maria used the children's funds for improper or unauthorized purposes. Moreover, the record demonstrates that Maria failed to comply with her obligation to provide Floyd with copies of the financial records relating to the children's accounts and that Floyd did not learn those accounts had been depleted until September 2001, approximately eight months before filing his request for relief. Finally, Maria fails to explain why, even assuming Floyd had been aware for "years," rather than months, that she had breached her fiduciary duties to their children by using the children's funds for unauthorized purposes, the doctrine of laches bars relief that protects the *children's* rights.

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[4] Maria apparently argued in the alternative that Floyd had agreed to pay the full cost of children's tuition or one-half of that sum. She failed to prove either version of the tuition agreement.

[5] Maria first raised the issue of laches in her reply brief on appeal. Points raised initially in the reply brief normally will not be considered, at least in the absence of a showing of good cause for the failure to present them earlier. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894-895, fn. 10; *Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.)

DISPOSITION

The August 2, 2002 order of the trial court directing Floyd A. Katske to withhold one-half of Maria T. Katske's monthly spousal support payments until the sum of $148,206.90 is accumulated and to establish blocked accounts for the benefit of each of his two children and to deposit the withholdings equally into those accounts is affirmed. Floyd A. Katske is to recover his costs on appeal.

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PERLUSS, P. J.

We concur:

JOHNSON, J.

MUÑOZ (AURELIO), J.*

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* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.